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## CONTEMPT OF COURT

(*Continued from April No., ante, p.* 230.)

(*Of the power of the superior courts at common law.*)

THE power of the superior courts to punish for contempt is, at common law, unlimited, save by the definition of the term "contempt of court;" extending to everything so denominated, whether in presence of the court or elsewhere, direct or constructive, and including many offences not constituting contempt to an inferior court. They can proceed summarily and of their own knowledge to examine and punish contempts, or can issue an attachment, either of their own motion or on that of parties interested: 4 Blk. 283; *Rex* v. *Almon*, Wilmot's Notes 243. But only courts of record can issue an attachment: Comyn's Dig., *Attachment*, (A 1).

The exercise of this power lies solely in the discretion of the judge, and will not be examined into by any other court: *Rex* v. *Clement*, 4 B. & Ald. 218.

The question as to the existence and exercise of this power may arise on a habeas corpus, a mandamus, a certiorari, and a writ of error or appeal, also collaterally on a suit for damages or a prosecution against the person who has exercised it, and in England on an application for remission of a fine.

Their power is also exclusive and independent of any other, nor will it be reviewed or controlled by any other court by mandamus, or on writ of error or appeal, certiorari, or habeas corpus. Nor is it requisite that the cause of commitment be set forth in the warrant, it is sufficient that the commitment be for contempt, for

as regards superior courts the presumption *omnia esse rite acta* always prevails concerning their proceedings, and that they have jurisdiction: *Regina* v. *Paty*, 2 Ld. Raym. 1105; *Brass Crosby's Case*, 3 Wilson 188; *Ex parte Kearney*, 7 Wheat. 41; 2 Bishop's Crim. Law, sect. 268; *Ex parte Nugent*, 1 Am. Law Jour. (N. S.) 107, 121; *Carus Wilson's Case*, 7 Ad. & E. (N. S.) 984; *Yates's Case*, 4 Johns. 368; 9 Id. 395; *State* v. *Tipton*, 1 Blackf. 166; *Hunter* v. *State*, 6 Ind. 423; *Gist* v. *Bowman*, 2 Bay 182; *Ex parte Fernandez*, 10 C. B. (N. S.) 3; Bac. Abr., *Attach.*, 468; *In re Cohen*, 5 Cal. 494, decided under the statutes of California; *Jordan* v. *State*, 14 Texas 436; *Ex parte Martin*, 5 Yerg. 456. Under the late code of Tennessee the law is otherwise: see *Sanders* v. *Metcalf*, 1 Tenn. Chan. 419; *Watson* v. *Williams*, 36 Miss. 331; *Clark* v. *People*, Breese 266; *Bickley* v. *Commonwealth*, 2 J. J. Marshall 575; *Johnston* v. *Commonwealth*, 1 Bibb 598; *Ex parte Stickney*, 40 Ala. 160; *Shattuck* v. *State*, 51 Miss. 50; *Ex parte Summers*, 5 Ired. 149.

The judgments of superior courts are never void but only voidable on plea or writ of error: 7 Bac. Abr. 67; 1 Chitty Pl. 183; 2 Salk. 674; *Kempe* v. *Kennedy*, 5 Cr. 185; cited 10 Wheat. 199; *Walbridge* v. *Hall*, 3 Vt. 119.

Of the jurisdiction of superior courts other courts take "judicial notice." "Nothing shall be intended to be out of the jurisdiction of a superior court except what expressly appears to be so:" *Peacock* v. *Bell*, 1 Saund. 74; Bac. Abr., *Courts*, D, pl. 3; 6 East 600.

In England these principles have not always been fully established. When Lord COKE was chief justice, and great jealousy existed between the courts of common law and chancery, the Court of King's Bench in several instances bailed or discharged on habeas corpus persons committed for contempt by the Court of Chancery, but the practice was discontinued: 2 Hawk. 168, sect. 76. See the cases cited and discussed in *Ex parte Fernandez*, 10 C. B. (N. S.) 3, and in Vaughan 139.

These efforts of Sir EDWARD COKE to control the Court of Chancery, "are now universally admitted to have been illegal as well as rude and intemperate:" BLACK, J., in *Passmore Williamson's Case*, 26 Penn. St. 20. See also KENT, C. J., in *Yates's Case*, 4 Johns. 369.

The Court of King's Bench, in virtue of its "supreme control

of all inferior courts," had the power to bail on habeas corpus in cases of such commitment by *all courts:* 2 Hawk. 168, sect. 77; but though it would do so in case of commitment by a mayor of a town, justice of peace, or other inferior magistrate, where the nature of the contempt is not shown, "yet it cannot be expected that it will, with the like readiness," do this where there is "a general commitment by a court of higher dignity, as of Oyer and Terminer, or one of the courts of Westminster Hall." In *Chambers's Case*, Cro. Car. 133, 168 (1627), who was committed by a decree of the Court of Star Chamber for "insolent behavior and words spoken at the council table," and brought before the King's Bench on habeas corpus, the return was adjudged insufficient, the words not being mentioned, "so as the court might adjudge of them," the prisoner was remanded and the warden advised to amend his return. The prisoner was again brought up under a rule of the court on the same habeas corpus, and the court not having time to consider his case was bailed to appear and be of good behavior in the meantime. On appearance the amended return set forth the "words of defamation of the government." The prisoner prayed to be delivered, but was informed by "all the court that to deliver one who was committed by the decree of one of the courts of justice was not the usage of this court."

This case was cited and approved by Lord Chief Justice De Grey in the *Lord Mayor's Case*, 3 Wilson 188 (1771), in the Common Pleas, where he says: "The Courts of King's Bench or Common Pleas never discharged any person committed for contempt, in not answering in the Court of Chancery if the return was for a contempt." "If the Admiralty Court commits for contempt this court never discharges the person committed." And again (p. 198), "this is a writ by which the subject has a right to the remedy of being discharged out of custody, if he hath been committed and is detained contrary to law; therefore the court must consider, whether the authority committing, is a legal authority; if the commitment is made by those who have authority to commit, this court cannot discharge or bail the party committed, nor can this court admit to bail one charged or committed in execution."

"Every court must be sole judge of its own contempts" (p. 201). "When the House of Commons adjudge anything to be a contempt, their adjudication is a conviction, and their commitment in consequence is execution; and the court cannot discharge or bail a

person that is in execution by the judgment of any other court," and this court, "can do nothing when a person is in execution, by the judgment of a court having competent jurisdiction; in such case this court is not a court of appeal" (p. 199).

In the same case BLACKSTONE, J., says (p. 204); "All courts, by which I mean to include the houses of parliament and the courts of Westminster Hall, can have no control in matters of contempt. The sole adjudication of contempt, and the punishment thereof in any manner, belongs exclusively, and without interference to each respective court. Infinite confusion would follow, if courts could by writs of habeas corpus, examine and determine the contempts of others, for if they have power to decide they ought to have power to punish; no other court shall scan the judgment of a superior court, or the principal seat of justice."

This case was a habeas corpus in the Common Pleas on behalf of Brass Crosby, Lord Mayor of London, committed to the Tower by the House of Commons for contempt: he was remanded by the Common Pleas.

See also *Murray's Case*, 1 Wilson 299, where the King's Bench refused to admit to bail one committed for contempt by the House of Commons. The court said: "This court cannot admit to bail a person committed for contempt in any other court in Westminster Hall."

A very celebrated case, where a commitment by a superior court was questioned, and the action of the court overruled by the discharge of the prisoners, in contradiction of the rule laid down above, is *Bushell's Case*, Vaughan 135 (1682).

This was a "most unconstitutional commitment of a jury" by the Court of Oyer and Terminer, for contempt in acquitting certain persons, against the direction of the court, and against the law and the evidence: (so stated in the order of the court as set forth in the return), for which they were fined, and on non-payment, imprisoned. The case came up on habeas corpus in the Common Pleas, and the prisoners were discharged. The grounds for so doing, as stated by VAUGHAN, C. J., were, 1, the generality of the commitment, on which point his decision has since been restricted to the case of commitments by inferior courts only: 2, that the action of the jury in acquitting, as stated in the return, was no cause of fine and imprisonment; this was most clearly and forcibly set forth.

Lord ELLENBOROUGH very probably had in mind this case (it had been cited before him in the argument) in *Burdett* v. *Abbot*, 14 East 60–70, when he said, p. 150: "if a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that court, or of any other of the superior courts, inquire further; but if it did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the court committing, but a ground of commitment palpably and evidently arbitrary, unjust and contrary to every principle of positive law or national justice, I say, that in the case of such commitment, if it should ever occur, but which I cannot possibly anticipate as ever likely to occur, we must look at it, and act upon it as justice may require, from whatever court it may profess to have proceeded." See this case discussed and qualified *In re Fernandez*, 10 C. B. (N. S.) 30, 32; *People* v. *Kelley*, 1 Am. Law Reg. (N. S.) 546, note *ad fin.*

So extreme a case as *Bushell's*, and so gross an abuse of the power of a court, can seldom if ever arise; should it do so, it is hardly possible that a court before which such a judgment should come, would do otherwise than follow the course indicated by Lord ELLENBOROUGH.

In *Rex* v. *Clement*, 4 Barn. & Ald. 218 (6 E. C. L. Rep. 407) (1821), the jurisdiction of a superior court came under examination. A rule to show cause and for a certiorari to the justices of the delivery of the gaol of Newgate, had been admitted in the King's Bench, the object being to bring up certain orders made by the said justices, for violation of which the said Clement had been fined by them.

The question of contempt or no contempt depended on the validity of these orders, made by a superior court. See *In re Fernandez*, 6 H. & N. 727.

HOLROYD, J.: "This was an order made in a proceeding over which the court had judicial cognisance: the subject-matter respecting which it was made, was then in the course of judicature before them. The object for which it was made was clearly, as it appears to me, one within their jurisdiction." The judge also said if the order imposing the fine was illegal, the party injured could make his defence in the Court of Exchequer. Rule discharged.

In *Carus Wilson's Case*, 7 Ad. & El. (N. S.) 1015 (1845), which

was a habeas corpus in the Queen's Bench for a person imprisoned for contempt by the Royal Court of Jersey, Lord DENMAN, C. J., says: "we must always feel most unwilling to interfere in such a way, indeed the practice has almost been discontinued for a century." And on page 1008, it is an exception to "the whole law of habeas corpus, whether under common law or statute, namely, that our form of writ does not apply where a party is in execution under the judgment of a competent court." "When a party has been before a court of competent jurisdiction, which court has committed him for a contempt or any other cause, I think it is no longer open to this court to enter at all into the subject-matter." See also Lord ELLENBOROUGH in *Burdett* v *Abbot*, 14 East 150. And the Court of Common Pleas in the *Matter of Andrews*, 4 Man., Gr. & Scott 225, declared that they had no power to discharge, on habeas corpus, a prisoner who had been committed for contempt by the Court of Chancery, and could not entertain any question as to the irregularity of such process.

*In re Crawford*, 13 Ad. & E. 613, which was a habeas corpus in the King's Bench to the Court of Chancery of the Isle of Man, the court said: "It is enough for us to see that the court has the power, and that is clear law." In such case, the question if a publication is contemptuous is for the court which commits, "as has been said in many instances." We have not to inquire into this matter, which has been adjudicated upon by a court of competent jurisdiction." p. 628. See, also, *Rex* v. *Faulkner*, 2 Mon. & Ayr. Cases in Bankruptcy 311, 344.

*In re Fernandez*, 100 C. B. (N. S.) 3, was a motion for a habeas corpus in the Common Pleas, in the case of a person committed for contempt by the Court of Assizes, in refusing to answer as a witness. It was decided that the Court of Assizes was a "superior" court, having as such full power to commit for contempt, and that, therefore, their warrant need not set forth the facts of the contempt, but was sufficient if stating generally a commitment for contempt. ERLE, C. J.: "It appears to me that the warrant was made by a competent tribunal, in respect of a matter within its jurisdiction, and that it is good upon the face of it. We are not a court of review or a court of appeal:" p. 25. The writ was refused. A similar motion had previously been made in the Court of Exchequer, and negatived on the same ground: see 6 H. & N. 727.

*Powers of Superior Courts at Common Law in the United States.*

In the United States two different views are held: the first is in accordance with that above set forth, and which we have seen to be the well-settled English doctrine. According to the other (while the distinction between superior and inferior courts as laid down above is recognised), so far as concerns the question if a contempt has been committed, and how it is punishable, the unrestrained and unsupervised exercise of the power over contempts, exclusive of and not subject to revision by any other court, belongs only to the highest of the superior courts; the others of them, which have been denominated "subordinate," to distinguish them from inferior courts, being, like the inferior court, subject in this respect to the control of the higher courts: *McLaughlin's Case*, 5 W. & S. 273.

1st. American decisions following the English doctrine. Of these one of the leading cases is *Ex parte Kearney*, 7 Wheat. 38 (1822), in which STORY, J., citing and approving *Brass Crosby's Case*, 3 Wils. 188, says, adopting the words of Lord DE GREY, C. J., "when a court commits a party for contempt, their adjudication is a conviction, and their commitment in consequence is execution." So it is most apparent, "that a writ of habeas corpus was not deemed a proper remedy where a party was committed for contempt by a court of competent jurisdiction, and that if granted, the court would not inquire into the sufficiency of the cause of commitment."

This was a motion in the Supreme Court of the United States for a writ of habeas corpus, in behalf of a person imprisoned for contempt, by the Circuit Court of the District of Columbia, in refusing to answer as a witness: it was held that the court had authority to issue the writ, where a person was imprisoned under the warrant or order of any other court of the United States, but that this was not a proper case for it.

The jurisdiction and authority of the court committing were unquestioned. "The only objection is that it (the court) erred in its judgment of the law applicable to the case." "This court has no appellate jurisdiction in criminal cases, by the laws of the United States." Hence it could not revise the judgment of the Circuit Court in this case, or set it aside and discharge the prisoner. The writ was denied.

This decision rested on the ground that a punishment for contempt was like conviction and sentence for a criminal offence.

Nor will the Supreme Court of the United States interfere by a mandamus, with the discretion of a district court, in regard to striking off an attorney from its rolls for contempt, holding it to be a matter not within their cognisance: MARSHALL, C. J., in *Ex parte Tillinghast*, 4 Pet. 108. But in a later case the Supreme Court, though refusing a mandamus to restore an attorney so stricken off, said, that their authority was doubtful, but whatever it was would be exercised only when the conduct of the court below had been "grossly irregular or flagrantly improper." "It could only interpose, on the ground that the circuit court had clearly exceeded its powers or had decided erroneously on the testimony:" *Ex parte Burr*, 9 Wheat. 529; s. c. 2 Cr. C. C. 379.

In Tennessee, although under the recent code, the supreme court has revisory jurisdiction in case of contempt, it has been held in the court of chancery that the court would not, on a bill in equity, enjoin the chancellor of a county court from punishing for contempt an officer of his court. "To concede that another judge may enjoin such a judgment is to concede not merely the power of revision, but that a judgment may be attacked by a new suit instituted for the purpose, even when the court has jurisdiction both of the subject-matter and the person, a position in conflict with every principle of law:" *Sanders* v. *Metcalf*, 1 Tenn. Ch. 419 (1873).

Prior to *Ex parte Kearney* occurred the important case of *J. V. N. Yates*, which came before the Supreme Court of the state of New York, in 1809 (4 Johns. 317), went thence to the Court of Errors and Appeals, which reversed the decision of the Supreme Court, in 6 Johns. 337, came again into the Supreme Court in another shape, in 5 Johns., was there decided in accordance with its previous opinion, in which the court was affirmed by the Court of Errors and Appeals, which thus reversed its own former action: see 9 Johns. 395.

Yates had been committed for a contempt by the Court of Chancery, discharged by a single judge of the Supreme Court on habeas corpus, recommitted by the Court of Chancery, from which commitment he prayed to be delivered on habeas corpus in the Supreme Court. The Supreme Court decided that the order of commitment, which set forth the act of contempt, was a good commitment;

that it had no power to discharge a person committed by the Court of Chancery for a contempt; and that it would presume that the proceedings of that court were legal, and that the conviction for the contempt was on sufficient and legal evidence.

KENT, C. J., in his opinion said there were many cases where the Court of King's Bench, and some where the Common Pleas, had, on *habeas corpus*, undertaken to examine and decide upon the cause and the authority for the commitment by another court, and except in a few anomalous cases, they were all commitments by inferior courts, citing the cases. "I apprehend that there is not an instance in the English law of a judge in vacation, undertaking to decide upon the legality of a commitment in execution by the judgment of any court of record, and much less of a court of the highest degree:" p. 357–8. After citing at large from the *Lord Mayor's Case*, he says, p. 372, "I have cited the opinion of these judges much at large, because I could not hope to improve upon the strength of their observations; and I entertain the most perfect conviction that the law as they declared it in this case was well understood and definitely established as part of the common law of England at the time of our Revolution."

This opinion, as was said, was finally affirmed in the Court of Errors and Appeals (9 Johns. 395), on the precise point decided, namely, the power of a single judge to discharge a person committed by another court, and it would seem that the court were also of opinion that the whole court had no more power in this respect.

The case in 9 Johns. was an action for the penalty, under the Habeas Corpus Act, by Yates against the chancellor.

It is interesting to observe the parallel between the action of the Court of Errors and Appeals in their first decision of this matter, and that of Lord COKE in the similar cases in the time of James I. KENT, C. J., in the course of his opinion in 4 Johns. 369, says: "Lord COKE'S conduct in the cases in the time of James I., where the King's Bench discharged persons on habeas corpus, who were committed by the Court of Chancery for contempt, has been uniformly admitted to have been erroneous and intemperate."

The doctrines of *Yates's Case* are still law in New York. If the court has jurisdiction and the proceedings are in due form, and the cause of the alleged contempt plainly set forth in the commit-

ment, as required by statute, the adjudication of the court as to the contempt cannot be reviewed on habeas corpus or certiorari: *People* v. *Mitchell*, 29 Barb. 622; 7 Abb. Pr. 96; 12 Id. 249; *Matter of Percy*, 2 Daly 530. An exception to the general rule is established by *People* v. *Kelly*, 24 N. Y. 74 (1861), a case to be discussed hereafter.

By statute April 15th 1854 (vol. 5, stat. 133) such adjudications may be examined on appeal, and before this statute the question of the jurisdiction and regularity of proceedings of the committing court had been considered on appeal in *People* v. *Sturtevant*, 5 Seld. 263.

*Ex parte Kearney's* and *Yates's Cases*, have been cited and followed in a number of other cases now to be remarked on.

Among the most interesting of these is that of *Passmore Williamson*, 26 Penn. St. 9 (1855). This was an application to the Supreme Court of Pennsylvania for a writ of habeas corpus for one committed by the United States District Court for contempt. Although the case before the court being a commitment by an "independent," "co-ordinate" court, belonging "to a different judicial system" and "responsible to a different sovereignty," is properly an authority only with regard to these conditions, and did not call for so strong an expression of opinion, BLACK, J., said: "The authority to deal with an offender of this class belongs exclusively to the court in which the offence is committed, and no other court, not even the highest. can interfere with its exercise, either by writ of error, mandamus or habeas corpus," p. 18: "On a habeas corpus the judgment even of a subordinate state court cannot be disregarded, reversed or set aside, however clearly we may perceive it to be erroneous, and however plain it may be that we ought to reverse it if it were before us on appeal or writ of error:" p. 17. "It is most especially necessary that convictions for contempt in one court, should be final, conclusive and free from re-examination by other courts on habeas corpus. If the law were not so our judicial system would break to pieces in a month:" p. 20, citing *Yates's*, *Kearney's* and the *Lord Mayor's Cases*. This case is distinguished in *Commonwealth* v. *Newton*, 1 Grant 453 (1857) *infra*, and as will be seen the law above laid down is not that of Pennsylvania except as qualified by other decisions.

In Vermont it has been said in *Vilas* v. *Burton*, 4 Am. Law Reg. 168 (1854), citing *Yates's Case*, that proceedings for con-

tempt, when the court has jurisdiction, are not revisable in any other. "There are no cases where such proceedings in the superior court have ordinarily been held revisable, unless where the proceedings were so irregular as to be against law and to give the court no proper jurisdiction:" p. 171.

In Kentucky the Supreme Court held that no writ of error or appeal lay to an order punishing for a contempt by a county circuit court, a court of competent jurisdiction: *Johnston* v. *Commonwealth*, 1 Bibb 598 (1809). But the doctrine of this case was greatly modified, and it was held that the Court of Appeals, though it would not retry the question of contempt, would correct erroneous judgments and sentences: *Bickley* v. *Commonwealth*, 2 J. J. Marsh. 572 (1829). See also *Patton* v. *Harris*, 15 B. Mon. 607 (1855). These cases were followed in *Ex parte Alexander*, 2 Am. Law Reg. 44, which arose in the Louisville Chancery Court in 1853, on a petition for a habeas corpus to be discharged from imprisonment by order of a circuit court for contempt. The Chancellor said: "This court cannot on habeas corpus deliver any person lawfully committed by the Circuit Court for contempt," nor "inquire into the question of contempt." It was further held that where the court had no jurisdiction or exceeded its power, the person should be released on habeas corpus. Citing, among others of the above cases, "the great and leading case of the *Lord Mayor of London*."

The commitment in this case being "until further order of the court," was held invalid, and the prisoner discharged. See also *Bickley* v. *Commonwealth*, *supra*; compare *Rex* v. *Clement*, 4 B. & Ald. 218. The Chancellor further said: "On habeas corpus the English courts have always looked into the authority by which a man was imprisoned. They have declined to examine the merits of the judgment on this writ, but only decide whether the court had power to give that judgment." The Revised Statutes of Kentucky, p. 215, say, "That no writ of error or appeal shall lie from an order or judgment of any court punishing a contempt." "This was the common law:" p. 49.

In *Ex parte Nugent*, in the Circuit Court of District of Columbia, 1848 (see 1 Am. Law J. (N. S.) 107), a case precisely analogous to that of the *Lord Mayor of London* came up. It was a petition for a habeas corpus for one committed for contempt before the Senate of the United States in secret session. CRANCH, C. J., in

his opinion followed very closely those of the judges in the *Lord Mayor's Case*, which, he remarks, "as Mr. Justice STORY said in delivering the opinion of the Supreme Court of the United States in *Kearney's Case*, settled the law upon that point," which he says further, "has so continued down to the present day" (p. 117). The court cited also the case of *Anderson* v. *Dunn*, 6 Wheat. 224, remarking that there the judgment of the House of Representatives committing for contempt came collaterally before the court, and could be called in question, that being a suit against the sergeant-at-arms where the commitment was pleaded as justification, while here it came directly before the court on habeas corpus, and the court, as in *Crosby's Case*, could not give relief without directly assailing it. The prisoner was remanded.

In *First Congregational Church* v. *Muscatine*, 2 Clarke (Iowa) 69 (1855), which was an appeal to the Supreme Court from an order of a county district court *discharging* from an alleged contempt, the court, citing the *Lord Mayor's*, *Kearney's* and *Yates's Case*, *State* v. *Tipton* and *Johnston* v. *Commonwealth*, *supra*, say: "These authorities are conclusive that in the absence of statute law each court of record is the sole and final judge in matters of contempt."

By sect. 1606 of the Code, "no appeal lies to an order to punish for a contempt, but the proceedings may in proper cases be taken to a higher court for review by certiorari." It was doubted if certiorari lay to an order *refusing* to punish for contempt.

*Jordan* v. *State*, 14 Texas 436 (1855), was a case of commitment for contempt by a district court, a petition to the same court for a habeas corpus, and an appeal to the Supreme Court from their refusal to grant it. *Ex parte Kearney* was cited by the court, which said: "Since an appeal will not lie in cases of contempt, neither will the writ of habeas corpus lie to revise the action of the court in punishing for contempt."

Under the statutes of Texas the judge has discretion to grant the writ, and it should be refused when evident that the party would not be entitled to his discharge, as "when he is detained for a contempt of court." See also *State* v. *Thurmond*, 37 Texas 340. An exception has been established when the proceedings of the committing court are so grossly defective as to be void; in such case the Court of Appeals will discharge on habeas corpus: *Ex parte Kilgore*, 3 Texas App. 247 (1877).

The High Court of Errors and Appeals of Mississippi has declared that under the common law and the constitution of the state it had no jurisdiction to review the judgment of any inferior court convicting of contempt. The court in this instance was not of an "inferior order," but one of record—a probate court. The *Lord Mayor's*, *Kearney's*, *Yeates's Cases* and *Commonwealth* v. *Johnston* were followed: *Watson* v. *Williams*, 36 Miss. 331. But if the court committing had no jurisdiction, its commitment would be void: *Shattuck* v. *State*, 51 Miss. 50. There has been a similar ruling in Alabama: *Ex parte Stickney*, 40 Ala. 160. And in Arkansas (see *Cossart* v. *State*, 14 Ark. 538), where it was held that neither under the statutes nor at common law would a writ of error or an appeal lie to an inferior court, even if it exceeded its jurisdiction, in matters of contempt.

In *Middlebrook* v. *The State*, 43 Conn. 257 (1876), a writ of error was brought in the Supreme Court to reverse the judgment of a court of common pleas fining and imprisoning for contempt. The contempt was a gross one in presence of the court. The Supreme Court, after a full examination of the facts, decided that the court below had jurisdiction, that its proceedings were regular and the sentence within its power, except as to a portion of it putting costs on the prisoner, as well as a fine, which was reversed; the rest of the judgment being affirmed. The portion reversed was held not warranted by the statute limiting the fine imposed for contempt, which, so far as it was an enabling act, was pronounced to be only declaratory of the common law. CARPENTER, J.: "The questions involved in this case are mainly questions of jurisdiction; therefore, it must not be regarded as a precedent, inducing the belief that in all proceedings for a contempt questions of law will be reviewed by this court, as in other cases:" p. 267. In the argument, *Kearney's* and *Williamson's Cases* were cited and relied on.

The principle enunciated in this case was followed in *Tyler et al.* v. *Hamersley*, 44 Conn. 393, which also was a writ of error in the Supreme Court from a judgment of a superior court, imprisoning for a contempt. HOVEY, J.: "Upon this motion (to strike off the writ of error from the docket), the question which at present presents itself is, whether a writ of error will lie upon an adjudication of a contempt." "But at common law no writ of error lies, except upon a judgment or an award in the nature of a judgment." Then, after citing the case of *The City of London*,

8 Rep. 383; *Rex* v. *Dean of Dublin*, 1 Stra. 536; 8 Mod. 27, and some others, he says: "These cases are sufficient to show that at common law, adjudications of contempt by courts of competent jurisdiction are final and cannot be reviewed in a court of error." "And the doctrine is strongly supported by numerous other authorities, English and American," enumerating most of the cases above commented on.

But the court distinguished the case before it, on the ground that therein the question of contempt had been tried, "upon an issue of law tendered by the party moving in the proceeding," and decided upon that issue. Had the issue been of fact the rule would seem to be the same. In such case the decision of the court may properly be reviewed in a higher one. As authority for this position, the court relied on *In re Cooper*, 32 Vt. 253 (1859), and *Rex* v. *Dean, &c., of Dublin*, 1 Stra. 536; s. c. 8 Mod. 27, admitting that the reasons are technical, but such as should not be discarded, although they should not be taken to establish a rule of procedure to open the way for writs of error in cases of contempt generally.

*In re Cooper* was a habeas corpus brought in a county court for one imprisoned for non-payment of a fine for contempt inflicted by a justice of the peace; the relator demurred to the return to the writ, which set forth the facts of the case, and was remanded by the court, on exceptions to whose judgment the case then came before the Supreme Court, which after examination of the facts decided that the justice acted within his jurisdiction, and that his proceedings were regular. A justice's court was declared to be one of record. It was held the issue of law raised was properly reviewable by the Supreme Court under the statute of Vermont. But the court affirmed the general principle that where the court has jurisdiction its exercise in a legal and proper manner is not reviewable by superior courts, and that this applies to justices of the peace, whose courts in Vermont are courts of record.

*Rex* v. *The Dean, &c., of Dublin*, was a mandamus from the King's Bench in Ireland, the return to which was adjudged insufficient, and the writ made peremptory, on which a writ of error was taken in the King's Bench in England.

Here it was held that this was not properly a judgment, hence that the writ of error would not lie; in the opinion it is said: "It is against the nature of a writ of error to lie on any judgment,

but in cases where an issue may be joined and tried, or where judgment may be had upon a demurrer, and joinder in demurrer." If the defendant had traversed the facts of the return, on which traverse the other side could take issue or demurrer, the writ of error would have been good.

In *Tyler* v. *Hamersley*, *supra*, the Superior Court had awarded a peremptory mandamus to which, before service thereof, the defendants had taken out a writ of error. Being advised by counsel that this operated as a supersedeas to the mandamus, they disobeyed it. To the answer to the petition for commitment for contempt the attorney for the state demurred; the court held the answer insufficient and ordered the defendants imprisoned. To this judgment the writ of error was taken. The Supreme Court held that, although by common law, which governed the case in Connecticut, no writ of error lay on "award of a fine and imprisonment for contempt," yet in this case the proceedings for contempt had not been according to the form and rules of the common law, but the parties and the court proceeded with the petition as if it had been an original writ; the defendant in error, the attorney for the state, formally demurred to the return, on which demurrer judgment was rendered, and on such judgment a writ of error would lie at common law and in Connecticut.

According to the law as laid down in this case, it would be in the power of any one committed for contempt by a subordinate court, to bring a writ of habeas corpus, demur to the return, and after judgment of the court thereon, carry up the matter to an appellate court; precisely this was done in *Cooper's Case*, 32 Vt. 253.

Grounded on the principle of these two cases, though not citing their authority, is a decision of the Supreme Court of Maine in *Androscoggin and Kennebec Railroad Co.* v. *Androscoggin Railroad Co.*, 49 Maine 391 (1862). An injunction had been granted by one of the judges of the Supreme Court, holding a county court, the violation of which he adjudged to be a contempt, and the Supreme Court held that such adjudication and rulings in matters of contempt, where the question of jurisdiction of the proceeding was "distinctly raised and adjudicated upon as matter of law," might be excepted to, and that the Supreme Court would revise the proceedings on writ of error. This principle seems not recognised in any other case than those above commented on.

In addition to the cases above mentioned, which cite and follow *Crosby's* and other similar cases, there are a few early ones which, though also in accord with the English doctrine, do not cite any of these cases, but seem to have been decided on general principles of law. Such is *State* v. *White*, Charlton 123 (1807), which was a commitment for contempt by an inferior court of record, and on habeas corpus in the Supreme Court, it held that the lower court had power to inflict punishment, at discretion, for all contempts of their authority; that the Supreme Court would not, therefore, discharge such persons, and especially it would not discharge nor admit to bail such persons, if officers of such courts. See, also, *Gist* v. *Bowman*, 2 Bay 182, in the Supreme Court of South Carolina. Recent decisions in Georgia and South Carolina, commented, *infra*, have modified the law in those states.

*Ex parte Martin*, 5 Yerger 456 (1830), was an appeal from a county court to the circuit court, and a writ of error on the judgment of the latter court, from the Supreme Court, which held that in a case of contempt no writ of error or appeal will lie, each court being its own exclusive judge of what is a contempt. The recent Code of Tennessee has changed this: *Sanders* v. *Metcalf*, 1 Tenn. Ch. 419; *State* v. *Woodfin*, 5 Ired. 199; *Ex parte Summers*, Id. 149.

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(*To be continued.*)

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## TRADE-MARKS.

THE recent decision of the Supreme Court of the United States in *In re United States* v. *Steffens*, delivered in last October Term 1879, has created an agitation which has ever since disturbed the public mind. That case has resolved that a trade-mark is not an invention or discovery, within the meaning of the clause of the constitution empowering Congress to secure to authors and inventors the exclusive right to their inventions and discoveries: *Leidersdorf* v. *Flint*, 18 Am. Law Reg. (N. S.) 37, and 7 Cent. Law Jour. 405. In *Duwel* v. *Bohmer*, at the April Term (1878) of the United States Circuit Court of the Southern District of Ohio, the directly